95-1736

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA
OCTOBER, TERM 1995

JOHN W. PEPPER and EVELYN J. PEPPER, et al.,
Petitioners,

v.

NICHOLAS DAMER, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

OF AMERICA

John W. Pepper & Evelyn J. Pepper
80 Q North Cabrillo no. 508
Half Moon Bay, California 94019
Mess. (415)726-6624
Petitioners in Propria Persona

Dated: 4/23/96

QUESTIONS PRESENTED FOR REVIEW

ISSUE 1

Did the supreme court of the State of California commit error in denying the petitioners' **petition for review** in failing to rule whether the petitioners' right to liberty of a contract and also the thirteenth Amendment to the United States Constitution had been violated by the unsolicited legal work partially completed by the respondent(NICHOLAS DAMER)?

A. Can a mere "**proposed fee arrangement**" ripen into a contract without a signification by one person to another of his willingness to enter into a contract with him on the terms specified in the offer?

B. Does an agreement between Attorney and Client need to be in writing when the amount of the negotiations is $225,00.00 and should that contract be witnessed by the parties involved?

C. Does a contract have to represent a meeting of the minds knowingly, willingly, and intentionally ?

D. Does the Judgment violate the Appellants right to liberty of a contract, and force the Appellants into involuntary servitude **(13th amendment of the constitution**), of an unconscionable contract?

E. Whether a judgment of the First Appellant Court of the State of California and the San Mateo Superior Court, is in excess of jurisdiction for their ruling beyond the constitutional authority?

F. Whether that judgment can force the petitioners' into an oppressive situation that causes an inequality of bargaining power resulting in absence of meaningful choices, or surprises, which occur when **unsolicited work is done by an attorney (Respondent NICHOLAS DAMER et al.)**?

G. Whether unsolicited work done by attorney NICHOLAS DAMER et al. are an oppressive and force full situations that cause an inequality of bargaining power resulting in absence of meaningful choices?

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JURISDICTION

Jurisdiction of this court is invoked as a Petition For Writ of Certiorari from the denial of the Supreme Court of the State of California, decision to deny the Petition for Review, that was filed on Nov. 21, 1995. The petitioners' now file this Petition for Writ of Certiorari to The United States Supreme Court, by writ of certiorari. The validity of a judgement of The State Court is drawn in question on the ground that it is in excess of jurisdiction to the Constitution, or Laws of the United States, or where any titles, right, privileges, or immunity is specially set up or claimed under the constitution, treaties, or statutes of, or commission held or authority exercised under.

The Petitioners, John W. Pepper and Evelyn J. Pepper, herein The Peppers, request that a Writ of Certiorari issue to review the opinion of the California State Supreme Court which denied the petitioners' Petition for Review. The Supreme Court has not stated the basis for their decision. In the court's order on Nov. 21, 1995 the

1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being John W. Pepper, Evelyn J. Pepper et al, and NICHOLAS DAMER, et al.

Court issued a general denial stating, "Petition for Review is Denied." This denial was not accompanied by facts, finding or conclusions of law. The Petition to this Honorable Court involves solely a challenge to their right to liberty of a contract and freedom to make choices of a contract to protect the petitioners' rights of the thirteenth and fith, Amendment to the United States Constitution.

Petitioners' believe the force of this oppressive situation that causes an inequality of bargaining power resulting in absence of meaningful choices or surprises, which occurs when **unsolicited work is done by attorneys (Respondent NICHOLAS DAMER,et al.).** Petitioners' believe this was done with the full intent to deprive the petitioners' of their right to liberty of a contract and places them under involuntary servitude of an unconscionable agreement by force, oppression, and intimidation that violates the petitioner's rights and liberties under the Federal and State Constitutions. Petitioners' also believe that the protections will stand in abatement to the First Appellants Judgement and the Supreme Courts of the State of California's denial of review on Nov. 21, 1995, these courts are within the boundaries of this United States of America.

The question thus presented to this court is of monumental significance and challenges the absolute protections to the petitioners' rights of the 13th and 5th, amendment of the Federal Constitution. As the judgment stands the petitioners' are being forced into involuntary servitude of an unconscionable contract which has caused great irreparable financial harm and emotional distress to the petitioners'. To date the question presented or review has been considered by the First Appellant Court of Appeals, and review denied by the State Supreme Court of the State of California. However, The petitioners' argue that this question clearly presents a judicial question of jurisdiction.

Respectfully whether the judgment of the Court, is within the scope of the federal constitution or whether the judgment is moot for lack of jurisdiction, plainly falls within the confines of the definition of a judicial question. Petitioner's believe the current judgment to be in excess of jurisdiction because the judgment deprives the petitioner's of the right to liberty of contract.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Sec. 1, AMENDMENT XIII FEDERAL CONSTITUTION

Neither slavery nor involuntary servitude, except as a punishment for crime where the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2 Congress shall have power to enforce this article by appropriate legislation.

Section 1. AMENDMENT V FEDERAL CONSTITUTION

No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation

STATEMENT OF THE CASE

Defendants/Appellants John W. Pepper and Evelyn J. Pepper, each appealed to the First Appellant Court, in propria persona from a judgment entered against them and from denial of their post trial motion for new trial or for judgment notwithstanding the verdict. Plaintiff, Nicholas DAMER, also appeals from the courts ruling on his tax costs. This dispute between the Peppers and DAMER arises from unsolicited legal work partially performed on or about Dec.19, 1989 by Mr. DAMER. The facsimile dated Dec. 19, 1989, was a **"PROPOSED FEE ARRANGEMENT"** unsigned draft, which was faxed to Mr. DAMER and on which he performed numerous revisions and altered the **"PROPOSED FEE ARRANGEMENT"** without the Petitioner's consent or knowledge . Within one or two days of his proposed revision he was no longer representing the Peppers. The petitioner's proceeded on with the Beachwood transaction with Mr. Wagner as counsel, on an urgency basis without Mr.Damers' services. As a result the Peppers hired Mr. Wagner as counsel to complete the negotiation and close escrow. Attorney DAMER sued the defendants (Peppers) and John Pepper Properties for breach of a contract and for

fraud (promises made without intent to perform) as a result of the fee dispute. After a 13-day trial the jury returned special verdicts by which they found that defendants had entered into a contract with attorney DAMER to deed him the lot and that plaintiffs' had made their promise without intending to perform it. The jury awarded attorney DAMER $225,000 in compensatory damages, but declined to award any punitive damages. Defendants moved unsuccessfully for new trial or for a judgement notwithstanding the verdict. Each of the defendants appeals from the judgement.

DAMER filed a cost bill seeking a total of $268,307.15, the bulk of which was some $165,000 in attorneys' fees and $94,623 in prejudgement interest. The court refused to approve either interest fees, and denied DAMER's request for witness fees as well. Attorney DAMER takes a timely cross-appeal from that order.

1 DECISION ON APPEAL OPINION BELOW

On Nov. 21, 1995, The Supreme Court of the State of California stated as follows: **"Petition for review DENIED"**

Decision from the First Appellant Court of the State of California,

states the order on plaintiffs' motion to tax is reversed insofar as it denies plaintiff prejudgement interest. Upon remand the superior court is directed to augment the judgement entered March 3, 1994, nunc pro tunc with $94,623 as an award of prejudgement interest from December 19,1989 to the date of judgement. In all other respects the order appealed from is affirmed. The judgement as augmented is affirmed.

REASONS FOR GRANTING THIS WRIT

Review by this Court is necessary to promote uniformity, on the grounds that the decision of the court of appeal is not in line with the authorities cited herein. It also appears this decision may deprive the appellants from their right to LIBERTY OF A CONTRACT, AND ALSO DENIED THE PROTECTIONS OF THE 13 AMENDMENT OF THE FEDERAL CONSTITUTION and force the appellants into involuntary servitude of an unconscionable fee for services rendered. The California business and profession code 6147 has provisions exactly for an attorney--client fee agreement. Mr. DAMER has not complied with this code in any manner.

The petitioner/Appellants believe this code was designed to

protect both the Attorney, and the client in the interest of the public. The petitioners' are also confused as to why the First Appellant Court has not addressed these issues as they were presented to the court and the court chose to ignore these issues. The Courts' ruling is necessary to **secure uniformity of decision**, and to answer **important questions of law** that are at issue herein, requiring settlement by this Court and also to protect the petitioners' constitutional rights and liberties under the 5th and 13th amendment of the Federal Constitution. The judgement against Petitioners' and each of them, does not comply with **California Civil Code 1580-1583**. (Meeting of the minds). Procedural aspect of unconscionability, refers to absence of meaningful choices on part of one party which may be evidenced by oppression that is an inequality of bargaining power resulting in absence of meaningful choices or surprises, which occurs when **unsolicited work is done by attorneys (Respondent NICHOLAS DAMER,et al.).** It deprives the petitioners' of their right to liberty of a contract, and pláces them under involuntary servitude of an unconscionable agreement by force, and deprives them of the protections of the 13 amendments of the Federal Constitution.

ARGUMENT

Defendants/Appellants John W. Pepper and Evelyn J. Pepper each appealed to the First Appellant Court, in propria persona from a judgment entered against them and from denial of their post trial motion for new trial or for judgment notwithstanding the verdict. Plaintiff, Nicholas DAMER, also appeals from the courts ruling on his to tax costs. This dispute between the Peppers and DAMER arises from UNSOLICITED legal work partially performed on or about Dec. 19, 1989 by Mr. DAMER. The facsimile dated Dec. 19, 1989, was a **"PROPOSED FEE ARRANGEMENT"** unsigned draft, see exhibit "(B-C)" which was faxed to Mr. DAMER and on which he made numerous revisions without the consent or knowledge of the petitioners'. Shortly thereafter, the petitioners'\Peppers' hired the services of Mr. Wagner as counsel to conclude the Beachwood transaction. The Beachwood transactions proceeded on an urgency basis, without Mr.Damers' services. Mr. Wagner as counsel for the petitioners' completed the negotiation and closed escrow. Attorney DAMER sued the defendants (Peppers) and John Pepper Properties for breach of a contract and for fraud (promises made without intent

to perform) as a result of the fee dispute. After a 13-day trial, the jury returned special verdicts by which they found that defendants' had entered into a contract with attorney DAMER to deed him the lot and that plaintiffs' had made their promise without intending to perform it. The jury awarded attorney DAMER $225,000 in compensatory damages, but declined to award any punitive damages. Defendants' moved unsuccessfully for new trial or for a judgement notwithstanding the verdict. Each of the defendants' appeals from the judgement.

DAMER filed a cost bill seeking a total of $268,307.15, the bulk of which was some $165,000 in attorneys' fees and $94,623 in prejudgement interest. The court refused to approve either interest fees, and denied DAMER's request for witness fees as well. Attorney DAMER takes a timely cross-appeal from that order.

POINT I

PREJUDGMENT INTEREST, WITHOUT CONTRACT

The First Appellant Court, has awarded the Respondent/DAMER prejudgment interest on some non- existent contract. To this date Mr. DAMER has not presented to the court or the petitioners' any evidence that a contract ever existed. Petitioners' believe this judgment

is in excess of the courts jurisdiction to make a ruling beyond the boundaries of the protections of the constitution (5th, and 13th amend, Federal Constitution). The claims made by Mr. DAMER of some agreement, which would make the date of exact indebtedness known, are ambiguous and to this date have not been produced to the petitioners'. The petitioners' have clearly stated that to the court **"THERE IS NO CONTRACT BETWEEN THE PEPPERS AND DAMER",** that would make certain or is capable of being made certain any amount of indebtedness. The authorities are very clear on this point. Mr. DAMERs' ability to recover prejudgment interest without producing some sort of evidence is barred by law. Where amount of damages cannot be awarded prior to verdict or judgement interest prior to judgement is not allowable. **Stein vs. Southern California Edison Co. (App.2 Dist. 1992) 8 Cal.Rptr.2d 907, 7 Cal.App.4th 565.**

Under this section C.C. 3287, interest cannot be awarded prior to judgement when amount of damages cannot be ascertained except on conflicting evidence, but when exact sums of indebtedness are known or can be ascertained readily, interest should not be denied.

Conderback, inc. Vs. Standard Oil Co. OF Cal., Western Operations (1966) 48 Cal.Rptr. 901, 239 C.A.2d 664.

Damages are deemed certain or are capable of being made certain within meaning of statute governing awards of interest on damages, where there is essentially no dispute between parties concerning basis of imposition of damages that are recoverable but where dispute centers of issues of liability giving rise to damages. **Stein vs. Southern California Edison Co. A.P. 2Dist.(1992) 8 Cal.Rptr.2d 907, 7 Cal.App.4th 565.** It appears that the Cross/Appellant has relied upon a case which does not apply to this instant case.

Prejudgment interest is available as a matter of law in tort actions for damages to real or personal property from the date the defendant has notice of an amount certain or capable of being made certain.

Levy Zenter Co. vs. Pacific Transportation Co. Damages are deemed certain or capable of being made certain, within this section authorizing person entitled to recover damages certain to also recover interest thereon from the day the claims become due, where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable, but the dispute centers

on the issue of liability given rise to damage. **Esgro Central, Inc. v. General Ins. Co. of America (1971) 98 Cal.Rptr. 153, 20 C.A.3d 1054.** The Petitioners' hereby ask the court to take judicial notice that there is not a certain amount stated on the face of the proposed fee arrangement.

POINT II

CAN A MERE PROPOSAL RIPEN INTO A CONTRACT

The Petitioners'/Appellants'faxed" a PROPOSED FEE ARRANGEMENT" to the Respondent/DAMER for his review. Mr. DAMER claims to be entitled to the conveyance of the lot as a result of the proposed fee arrangement dated December 19, 1989. In his response, he relies upon the November 18, 1988 agreements for the conveyance of lot M. This agreement is irrelevant and has been performed. Lot M (also known as lot 96) was conveyed to Mr. DAMER and the assessments referred to above were paid on his behalf. The fee which Mr. DAMER is attempting to sustain is unenforceable since there is no signed document agreeing to the conveyance of the petitioners' property, or describing with clarity the terms for this transaction. It appears that the proposed fee arrangement

is an unconscionable fee for services rendered B.P. 6147, it is unenforceable under the Rules of Professional Conduct and does not meet the requirements of California Civil Code 1580--1583 and California B.P.6147.

UNSOLICITED LEGAL WORK IS DENIAL OF MEANINGFUL CHOICES AND CREATES OPPRESSION

Under California Law, to find a contract of adhesion, court must find that a term violates public policy, is unconscionable, and was added in bad faith.N.D. Cal. 1994 Hoy v. Sears , Roebuck & Co861 F.Supp881

"SUBSTANTIVE UNCONSCIONABILITY" necessary to deem a contract unenforceable exist where there is allocation of risk or costs which are one-sided and not justified by circumstance in which contract was made. Cal . APP. 2 Dist. 1994 34 Cal. Rptr. 2d 695

The Respondent/DAMER admits he completed the work even before the December 19,1989 proposed fee arrangement on page 22, line 19-20 of Respondents Brief. Although it is not clear how he did this work without the authorization of the Appellants.

"Oppression " exists Under California law for the purpose of rendering a contract unconscionable, where the inequities of bargaining

power between the parties result in no real negotiation and the absence of meaningful choice. Premier Wine & Spirits of South Dakota Inc. V. E. & J. Gallo Winery, 644 F. Supp. 1431, affirmed 846 F.2d 537.

The Appellants contend that an unconscionable contract is unenforceable as a matter of law. The judgement against Appellants and each of them does not comply with Cal. C.C. 1580-1583. (Meeting of the minds). "Procedural aspect of unconscionability refers to absence of meaningful choice on part of one of parties which may be evidenced by oppression that is inequality of bargaining power resulting in absence of meaningful choice, or surprise, which occurs when objectionable terms are hidden in a contract. Carbonia V. Arrospide Cal.App. 1 Dist. 1991 2 Cal.Rptr.2d 845

CONCLUSION

The United States Supreme Court, the final authority in this nation on matters of law, and guardian of the liberties of the American people, should review this matter of a question of law that presently exists to preserve the peace and dignity and promote uniformity of law.

The petitioners' have constantly asked the State Courts to answer these important questions of law. As of to date we have been ignored.

These questions are the very premise of this action. The petitioners' have also continuously brought these points before the court for their consideration, all to no avail and believe the courts decision is beyond the boundaries of the U.S. Constitution and is therefore moot. John and Evelyn Pepper\Petitioners' believe that without a valid "CONTRACT" there cannot be a mandate to perform. The petitioners' also believe they are being forced into involuntary servitude of an unconscionable contract, to wit there is no agreement and in violation of their right to property and liberty of contract. The respondent believes that he is entitled to $225,000.00 for four days of unsolicited work. This unsolicited work partially completed with the sole intent was to force the petitioners' into giving this attorney more land is nothing more than extortion and oppression. Should this attorney **(Respondent NICHOLAS DAMER)** followed California State law of the business and profession code.(6147) he needed to have an agreement in writing between the parties which to this day does not exist. The petitioners' believe this is nothing more than an Attorney beating up a pro per litigant and stealing their property all for his gain. The petitioners' are confused as to how this attorney

(DAMER\RESPONDENT) can break the law with impunity and violate the petitioners' rights. The Courts will not take Judicial Notice of our **California State Law (B.P.6147)**, thus is the reasoning for bringing this to the Courts attention and requesting a decision.

WHEREFORE, Petitioner John W. Pepper and Evelyn J. Pepper respectfully requests for the reasons herein advanced, and on the authorities cited. The petitioners' respectfully urges that The United States Supreme Court to review this matter and answer the questions of law once and for all, so that uniformity of law may be upheld based upon all of the foregoing. The Petitioners' hereby request this court to exercise its independent judgement, and settle these important questions of law.

1. Rule on questions of law regarding the petitioner's 13th and 5th amendments of the Federal Constutition.?

2. Was there a lawful binding contract ?

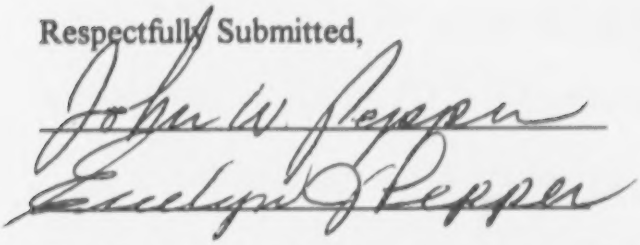
3. Remand the case for settlement.

4.Rule on questions of law to protect the petitioner's rights and liberties.

5. Is the judgment of The First Appellant Court moot for lack of jurisdiction?

Dated: April 23, 1996

Respectfully Submitted,

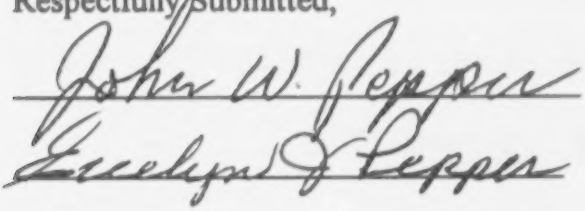


Evelyn J. Pepper, John W. Pepper, in propria persona

DECLARATION

We, John W. Pepper and Evelyn J. Pepper, declare that we are the Petitioners' in the foregoing action, that we have read the contents thereof, that they are true to the best of our knowledge except those allegations based on information and belief, and as to those, we believe them to be true. Dated: April 23, 1996

Respectfully Submitted,



Evelyn J. Pepper, John W. Pepper, in Prpperia persona

APPENDIX A

First Appellate District, Division Four, No. A066088

SO49381

IN THE SUPREME COURT OF CALIFORNIA

NICHOLAS DAMR Et Al.. Appellants

V.

JOHN W. PEPPER Et Al., Appellants

SUPREME COURT
FILED
NOV 21 1995
Robert Wandruff Clark
Deputy

Petition for review DENIED.

LUCAS

Chief Justice

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FILED
Court of Appeal
First App. Dist

AUG 16 1996
RON D. BARROW, CLERK

By_____
Deputy

NICHOLAS DAMER et al.,

Plaintiffs and Appellants,

v.

JOHN W. PEPPER, et al.,

Defendants and Appellants.

A066088
(San Mateo County Super. Ct. No. 360380

Defendants, John W. Pepper and Evelyn J. Pepper each appeal in propria persona from a judgement entered against them and against John Pepper Properties, Inc. and from denial of their post trial motion for new trial or for judgment notwithstanding the verdict. 1 Plaintiff, Nicholas DAMER, also appeals from the court's ruling on his motion to tax costs.

The dispute between Mr. and Mrs. Pepper and Mr. Damer

arose from legal work Mr. Damer provided to the Peppers in late 1989 in connection with their development of a subdivision. In short, Mr. Damer had represented the Peppers in the past and the Peppers proposed deeding to Damer a lot in a Half Moon Bay subdivision in consideration for his work for them. A letter dated December 19, 1989, and captioned "[r]e: " Proposed Fee Arrangement" to that

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1 Although the corporation also appealed, its appeal was dismissed when it failed to file an opening brief in a timely manner. The judgment was rendered against each of the defendants, jointly and severally.

effect was drafted by Mrs. Pepper and apparently sent to Damer, Damer made notations on the document's face and signed it, but it was never signed by the Peppers or by the corporation. The Peppers apparently refused to pay Damer, either by delivering the deed to the lot or its cash equivalent.

Attorney Damer sued defendants -- Mr. and Mrs. Pepper and John Pepper Properties, Inc.--for breach of contract and for fraud (promise made without intent to perform) as a result of the fee dispute.

After a 13-day trial the jury returned special verdicts by which they found that defendents had entered into a contract with attorney Damer to deed him the lot and that plaintiffs had made their promise without

intending to perform it. The Jury awarded attorney Damer $225,000 in compensatory damages, but declined to award any punitive. Defendants moved unsuccessfully for new trial or for a judgment notwithstanding the verdict. Each of the defendents appeals from the judgment.

Damer filed a cost bill seeking a total of $268,307.15, the bulk of which was some $165,000.00 in attorney's fees and $94,623 in prejudgment interest. The court refused to approve either the interest or the attorney's fees, and denied Damer's request for witness fees as well. Attorney Damer takes a timely cross-appeal from that order.

Appeal

On Appeal John and Evelyn Pepper each appear propria persona, but file a single set of briefs.2 Their opening brief raises nine errors or issues. None of these issues, however, is supported by citation to the record in violation of the requirements of California

Rules of Court, rule 15, subdivision (a). The appellants have a duty to cite to that portion of the record in which the alleged error occurred; this court is not required to search the record to locate and review the rulings of which appellants complain.3

---

2 At trial Mr. and Mrs. Pepper and the corporation were represented by counsel.

3 The defects in appellants' opening brief were detailed for our benefit by Mr. Damer, who nonetheless asked that we not strike the brief as to do so would only result in additional delay for rebriefing. We have followed that course. (Cal. Rules of Court, rule (MIchelson v. Hamada (1994) 29 Cal. App. 4th 1566,1589). We do not therefore address any of the claimed errors raised by appellants.

Cross Appeal

By his appeal attorney DAMER contends that the trial court erred in refusing to award him prejudgment interest on his damage award of $225,000 and by failing to make an award to him of his attorney's fees. Mr. DAMER has also asked this court to award him sanctions for what he contends was a frivolous appeal.

Prejudgment Interest

Before the trial court attorney DAMER argued that he was entitled to prejudgment interest on the value of the promised lot either under Civil Code section 3287 or under Business and Professions

Code section 6204.

DAMER maintained below as he does before us that he was entitled to prejudgment interest on his damages both because they resulted from a breach of contract and from fraud. Conceding that interest on the contract claim might not have been awarded as a discretionary matter (Civ. Code, 3287, subd. (b)), if the claim was unliquidated, DAMER insists that the amount of the claim was liquidated. In short, he maintains that under either the contract or the tort cause of action he was entitled to prejudgment interest because the value of the lot he was offered by the Peppers was known at the time of the agreement to be $225,000.

The jury was asked in the last question on the special verdict form to find the total amount of all damage suffered by attorney DAMER after it concluded that the Peppers had breached the contract and had made a promise without intending to perform it. On the special verdict form the jury wrote "$225,000.00 or equivalent (sic) to Lot 95/Lot L."

Under Civil Code section 3287, subdivision (a) prejudgment interest is to be awarded on tort damages which are capable of being

made certain by calculation. (Sagadin v. Ripper (1985) 175 Cal. App. 3d 1141, 1175.) Damages are deemed to be certain or capable of being ascertained under subdivision (a) when the dispute between the parties centers on the issue of liability rather than upon the basis by which the amount owed or whether he could compute it. (Ibid.) Prejudgment interest is also to be awarded for breach of contract from the date of breach. (Civ. Code, 3289, subd. (b).)4

18, subdivision (3).) Among the matters to which the Peppers object are various references to case No. 38495 in San Mateo Superior Court. Mr. DAMER has invited us to take judicial notice of various documents pertaining to that action. We decline to do so. (Evid. Code, 459, subd. (a), 452, sud. (d)(1).)

For their part the Peppers have moved to strike certain portions of Mr. DAMER's briefs on the ground that they contain material which is outside the record. We have likewise chosen not to strike the offending portions, but to disregard them. (Cal. Rules of Court, rule 18, subd. (3).)

In replying to Mr. DAMER's motion for prejudgment interest the Pepper's responding papers asserted that at trial the Peppers "did not seriously contest that the valuation of the lot was $225,000." Instead, at trial they argued that their agreement with DAMER was for him to be paid his hourly rate, which they calculated would have yielded a fee of no more than about $19,000. Here the dispute was

over the basis of the liability --whether or not the terms outlined in Mrs. Pepper's proposal constituted the terms of the contract for Mr. DAMER's professional services. By its answers to the special verdict interrogatories the jury found that there was a contract to deed Lot L/95 and that the contract was breached.5 The damages DAMER proved at trial for both his contract and his tort claim were identical, the value of the lot.

---

4 "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach." (Civ. Code, 3289, subd. (b).)

5 Although a specific question about deeding Lot L/95 was not asked, at the conclusion of questions about whether there had been a contract entered into, performed., and breached by defendants, the jury was told "If you find that a contract to deed L0(t) L95 is established, you need not answer Questions 5, 6, and 7." The jury did not answer questions 5, 6 or 7.

It was error for the trial court not to have awarded prejudgment interest on those damages.

Mr. DAMER contends that prejudgment interest should be calculated on the award beginning on December 19, 1989. In an action based upon contract the calculation of interest begins at the time the money is due. (Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 376.) By the terms of the "fee proposal" and the testimony of Mrs. Pepper at trial attorney DAMER's responsibility under the contract was to successfully negotiate with a buyer, who turned out to be Crowell. That negotiation was concluded at the very latest on December 22, when various documents were signed. For tort claims interest begins to run at the point at which the damages meet the statutory requirement of certainty or are capable of being made certain. (Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal. App. 3d 762, 799.)

On the record before us it is unclear exactly when the fraudulent promise was made by the Peppers, but as evidenced by their fee "proposal" to attorney DAMER it was made at least as of December 19,. 1989. Mrs. Pepper valued the lot at $225,000 in her

December 1989 dealings with attorney DAMER. The jury implicitly found that the promise was to deed lot 95/Lot L and that its value was$225,000. Thus, as of December 19, 1989, the tort had been committed and Mr. DAMER's damages were certain. A single set of facts supported both Mr. DAMER's contract and tort claims, the damages for which were measured by the lost value of Lot 95/Lot L. (DuBarry Internat., Inc. v. Southwest Forest Industries, Inc. (1991) 231 Cal. App. 3d 552, 564-565 (when damages for tort claim are same as for contract breach plaintiff recovers only once].) Because the special verdict does not break out portions of the total damages for either the contract or the tort claim are same as for contract breach plaintiff recovers only once}.) Because the special verdict does not break out portions of the total damages for either the contract or the tort claim it is appropriate to calculate prejudgment interest on the entire $225,000 from December.

Attorney DAMER urges us to remand this cast to the trial court directing it to determine the amount of attorney's fees and witness fees he should recover. He contends that he is entitled to receive such an award either under Business and Professions Code

section 6204 which permits a fee award to an attorney who prevails at trail after a fee arbitration or under Code of Civil Procedure section 128.5 as sanctions for merit less claims made in the arbitration and at trail. We are unpersuaded.

Business and Professions Code section 6204, subdivision (d) provides that "(t)he party seeking a trial after arbitration shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award.....The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorneys' fees and costs incurred in the trial after arbitration .....In fixing the attorneys' fees, the court shall consider the award and determinations of the arbitrators, in addition to any other relevant evidence."

It is clear that the subdivision permitting an award of attorney's fees and costs assumes that a fee arbitration has taken place before the matter is tried. Here no arbitration was actually conducted. Although the Peppers sought arbitration, before the matter could be heard they voluntarily dismissed the proceeding. However burdensome or costly that dismissal was to attorney DAMER, no arbitration was conducted

and neither an award or findings were ever made. Mr. DAMER is not eligible for an award of attorney's fee under this section for the simple reason that the section presumes a proceeding which never occurred, and therefore DAMER is not a prevailing party within the plain meaning of the statute.

Attorney DAMER also contends that the trial court erred in refusing to award him attorney's fees and costs under Code of Civil Procedure section 128.5. A refusal to make such an award is reversed only if it results in a manifest miscarriage of justice. (Dolan v. Buena Engineers, Inc. (1994) 24 Cal. App. 4th 1500,1504.)

Attorney DAMER argued to the trial court that plaintiffs had made allegations charging him with self-dealing and with a conflict of interest in undertaking representation of them in this matter. The trial court denied his motion for fees and costs without specifying its reason for doing so. Mr. DAMER urges this court to conclude the because the jury found in his favor on the fraud count---namely that the Peppers had promised to pay for his services without intending to keep that commitment--the "entire conduct of the defense in this case was in bad faith." To accept his reasoning would be to say that every

prevailing claim involving a promise made without intent to perform will support sanctions under Code of Civil Procedure section 128.5. The contention is silly.

The section permits a trial court to award attorney's fees and costs for an action undertaken in subjective bad faith that is either frivolous, that is lacking in objective element of lacking legal merit are required in order to make a sanction award for a frivolous action. (Dolan v. Buena Engineers, Inc., supra, 24 Cal. App. 4th at pp. 1501-1506.) Thus, even if we were to assume that the allegations of self-dealing and conflict of interest raised by the Peppers were without legal merit (something it is quite impossible to do on the incomplete record before us) we must assume that the trial court concluded that Pepper did not raise those claims out of improper motive. It was in a far better position than this court is to make that determination , and we cannot say that its denial of sanctions under Code of Civil Procedure section 128.5 was an abuse of discretion.6

Motion for Sanctions for Frivolous Appeal

Attorney DAMER has also asked this court to award him $10,000 in attorney's fees as sanctions against the Peppers for having

taken a frivolous appeal. (Code Civ. Proc, _____

6 In light of our conclusion that the trial court did not err in denying Mr. DAMER a award of attorney's fees under either the Business and Professions Code or the Code of Civil Procedure we need not reach his additional contention that as an attorney he would still be able to recover attorney's fees for his self-representation.

907, Cal. Rules of Court, rule 26, subd. (a).) Code of Civil Procedure section 907 permits an award of sanctions for an appeal which is frivolous or taken solely for the purpose of delay. A frivolous appeal is one which is either prosecuted for an improper motive or which any reasonable attorney would agree is totally and completely without merit. (In re Marriage of Flaherty (1982) 31 Cal. 3d 637,650.)

Specifically Mr. DAMER argues that because the Peppers brief was so deficient he was required to "defend against arguments that were not supported by the record and to prepare a Respondent's Appendix " in order to demonstrate the inaccuracies and deficiencies in the contentions raised by the Peppers. Finally, because the Peppers failed to exchange with Mr. DAMER copies of those portions of the reporter's transcript that they had ordered, he was obliged to review the copies filed with this court.7

Mr. DAMER maintains that he spent some 50 hours researching

and preparing the reply portion of his brief. Nonetheless Mr. DAMER's 36-page brief which functioned both as a respondent's brief and a cross-appellant's opening brief contains barely 4-1/2 pages devoted to discussion of the legal issues raised by the Peppers. The remainder of the brief's legal argument is directed to his cross-appeal. Mr. DAMER's declaration in support of the motion asserts that his 50 hours of research included the time he spent in the Court of Appeal file room reviewing the transcripts of which the Peppers failed to provide him copies.

While we are not prepared to declare that this appeal is so utterly devoid of merit as to be frivolous, we did issue an order to show cause to the Peppers to explain why they should not be sanctioned under California Rules of Court, rule 26, subdivision (a) to reimburse_____

7 We have been provided a copy of a letter dated September 16, 1994, to the Peppers' then attorney which made a request for the mutual exchange of the reporter's transcripts. That attorney moved to withdraw from the case in early October. According to the Peppers they received a "confusing" letter late the following March from DAMER asking for records, but according to them it contained language regarding the mutual exchange provisions of California Rules of Court, rule 10, subdivision (e). Neither side has provided this court with a copy of that letter.

Mr. DAMER's travel expenses to and from this court so that he could examine the copies of the reporter's transcript which they failed to exchange with him. At the hearing on the order to show cause Mr. DAMER offered to waive a sanction award if the Peppers would agree to provide him with the portions of the reporter's transcript which were prepared for them.

Disposition

The order on plaintiff's motion to tax costs is reversed insofar as it denies plaintiff prejudgment interest. Upon remand the superior court is directed to augment the judgment entered March 3,m 1994, nunc pro tunc with $94,623 as an award of prejudgment interest from December 19, 1989 to date of judgment. In all other respects the order appealed from is affirmed. The judgment as augmented is affirmed.

It is the order of this court that a decision to award sanctions to Mr. DAMER for his travel time to and from this court in order to examine the reporter's transcript shall be held in abeyance until the Peppers timely provide Mr. DAMER those portions of the reporter's transcript ordered by them. Upon notice from Mr. DAMER to this court that the transcript has been provided to him the award will be denied.

Each party to bear its own costs on appeal.

_____
Poche, J.

We concur:

_____
Anderson, P.J.

_____
Perley, J.

DAMER v. Pepper
A066088

BEST AVA

December 19, 1989

Exhibit B

Nick Damer
Damer & Stryker
P. O. Box 939
El Granada, Ca. 94018

Re: Proposed Fee Arrangement

Dear Nick:

Wes & I propose the following:

We will deed Lot 95, 688 Silver Avenue, APN 056-082-730 to you free of First Deed Of Trust to The William Lyon Company, but subject to assessments listed on preliminary title. The transfer of this lot will cover the following services:

1. You will complete successful negotiation of Jt. Venture Agreement or Assignment of Lyon/Pepper Contract on the Beachwood Subdivision, with Crowell, Nerhan, Grupe, Inc, Nat Landes, or any other interested party or parties. Will continue to obtain an extension from the William Lyon Company.

2. All fees owed to Damer & Stryker as of this date are considered paid, including Wes Pepper vs. McComas and the completion of Pepper vs Marchand. Wes, You and I will discuss future activity with Wes Pepper vs. McComas after January 1, 1990.

3. If we at some time decide to sue Lyon for damages re Highland Park/Beachwood we will discuss as a separate entity later.

Also Nick, Lot 95 has plans in City Of Half Moon Bay Building Department and we received California Coastal Commission approval on December 12, 1989 although we still have a lenghty process to actually get the Coastal Permit in our hand. I'm sure you would probably want to change the plans we now have in for approval, but if that be the case you should talk to Cathy about the best way to substitute plans so you don't rock the boat as the sewer permits are grandfathered in on these lots til March 19, 1990. Any future fees necessary to complete the application process will be your responsibility.

If you have any problems with this just call and we can discuss.

_____
John W. Pepper

_____
Evelyn J. Pepper

ACCEPTED: _____

LABLE COPY

BEST AVA

December 19, 1989

Exhibit C

Nick Damer
Damer & Stryker
P. O. Box 939
El Granada, Ca. 94018

Re: Proposed Fee Arrangement

Dear Nick:

Wes & I propose the following:

We will deed Lot 95, 688 Silver Avenue, APN 056-052-730 to you free of First Deed Of Trust to The William Lyon Company, but subject to assessments listed on preliminary title. The transfer of this lot will cover the following services:

1. You will complete successful negotiation of Jt. Venture Agreement or Assignment of Lyon/Pepper Contract on the Beachwood Subdivision, with Crowell, Nerhan, Grupe, Inc., Nat Landes, or any other interested party or parties. Will continue to obtain an extension from the William Lyon Company.

2. All fees owed to Damer & Stryker as of this date are considered paid, including Wes Pepper vs. McComas and the completion of Pepper vs Marchand. Wes, You and I will discuss future activity with Wes Pepper vs. McComas after January 1, 1990.

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If you have any problems with this just call and we can discuss.

John W. Pepper

Evelyn J. Pepper

ACCEPTED: OK ND for DdS

is also willing to pay DdS $ 2 lots if he ends up as Buyer of Beachwood

Who is this?

You know this already.

(water, street + taxes)

attempt to

or resale of

default proceedings

(or specific performance)

Evelyn - I'd get the building permit (your plans) and then amend -- probably a better way to go?

ABLE COPY